United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7583

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

V/O EXPORTKHLEB,

Plaintiff-Appellant,

against

TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKIEL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE TEXAS TRANSPORT & TERMINAL CO., INC.

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TABLE OF CONTENTS

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Statement

The suit which is the subject of this appeal was commenced on January 17, 1975 by the filing of a complaint in Admiralty, followed on the same day by the filing of an amended complaint adding the M/V CONSTANTIA and her owner Christian F. Ahrenkiel as defendants. For ready reference, the amended complaint is printed as an exhibit to this brief.

Subsequently, on the motion of or with the consent of plaintiff's counsel, Continental Grain Export Corporation

and Amtorg Trading Corporation were dropped as parties to the action. Jurisdiction in rem over M/V CONSTANTIA was never obtained. No attempt was made to serve or obtain jurisdiction over Christian F. Ahrenkiel until March 25, 1976, more than fourteen months after the filing of the complaint and amended complaint. See Docket Entries (A.1). The District Court has held that the service attempted on March 25, 1976, "did not give rise to personal jurisdiction over Ahrenkiel" (A.42).

Schedule A attached to the amended complaint states that plaintiff V/O Exportkhleb is an entity organized and existing under the laws of the USSR, with an office and place of business in Smolenskaja, USSR.

Christian F. Ahrenkiel is said to have had an office and place of business in Hamburg, Germany. There is no allegation that he was present in New York, was doing business in New York, had an agent for the service of process in New York, had property in New York, or was otherwise subject to suit in the United States District Court for the Southern District of New York.

TTT Ship Agencies, Inc., formerly known as and sued herein as Texas Transport & Terminal Co., Inc. (hereinafter TTT), is described as a corporation organized and existing under the laws of one of the states of the United States with an office and place of business in New York City.

The complaint and amended complaint state that "this is an admiralty or maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure." No diversity jurisdiction is alleged and none could have been, as defendant Amtorg Trading Corporation is described in Schedule A attached to the complaints as a corporation organized and existing under the laws of the USSR. As both plaintiff and defendant Amtorg are instrumentalities of the Russian government, the pleading presented the bizarre

picture of the Russian government coming to New York and suing itself in admiralty.

It is alleged in the amended complaint that the defendants, including TTT, were common carriers by water for hire and owned, operated, managed, chartered and controlled the M/V CONSTANTIA which vessel received plaintiff's cargo of corn in Philadelphia on June 15, 1973 and delivered the same at the Russian port of discharge, short and in damaged condition by reason of the defendants' having breached their duties and obligations as common carriers.

Dismissal of the Suit as against TTT

TTT moved to dismiss the suit as against it on the grounds that it was not the carrier and that it signed the bill of lading as agent for the Master, its disclosed principal.

It was undisputed that TTT signed the bills of lading for the Master and that the agency was disclosed. This fact is still undisputed as Appellant states at p. 6 of its Brief:

> "• • • TTT signed the bills of lading on behalf of the master pursuant to a letter of authorization from the master. (A 20). This fact is undisputed and so acknowledged by Judge Haight in his Memorandum and Order." (A.45)

Judge Haight also said at A.45:

> "The documents submitted on the motion demonstrate with perfect clarity that TTT neither acted, nor held itself out as, a common carrier by water in connection with this shipment."

Moreover, Appellant did not dispute the truth of the statements in Mr. Sweet's affidavit (A.4-6). Mr. Sweet

stated at A.5 that TTT was not a common carrier and did not own, operate, manage, charter or otherwise control the M/V CONSTANTIA in relation to subject voyage and shipment or any other.

The only connection with the matter upon which plaintiff relied to make TTT a carrier of the shipment or subject to the liability of a carrier was that it signed the bills of lading as agent for the master and with his authority.

As Judge Haight said:

> "• • • plaintiff cites no authority that an agent, performing this limited function, becomes liable as an ocean carrier, and of course that is not the law." (A.45)

Therefore, the suit was properly dismissed as against TTT.

I

There being no material issue of fact, the suit was properly dismissed on motion.

At page 6 of its Brief, appellant cites the Canadian case of *International Paper Sales Co., Inc.* v. *Fundy Shipping Ltd.*, 1970 A.M.C. 1358, for the proposition that a court can never determine on motion whether an agent who signs a bill of lading on behalf of the master of a vessel is liable as a principal. Of course, this is not the rule in this jurisdiction and is probably not the rule in Canada. The headnote in A.M.C. upon which appellant relies is misleading. In the *Fundy Shipping* case, it was not at all clear from the documents presented on the motion in what capacity the agent had signed. The court said at p. 1361:

> "An examination of the four bills of lading involved in this case indicates that Captain Crawford signed them on a line consisting of a 'per' at the beginning

> of same and the word 'master' printed thereunder, but also containing stamped thereunder the words 'Fundy Shipping, Ltd.' It is not at this juncture the time and place to determine the status of Fundy Shipping, Ltd. in these proceedings nor should this Court, at this stage, attempt to decide whether the above company, through Captain Crawford, became implicated as a party by acting in such a way as to indicate that it was doing so as a principal and, thereby, involving its liability herein. This is a question which may be more easily determined after all the facts have been established before the trial court."

It is submitted that granting an extension of time for suit or any other activity of TTT in connection with the claim in the hands of Randall acting for plaintiff's underwriters could not retroactively make TTT an ocean carrier or liable for the performance of the contract contained in the bill of lading.

If TTT committed any tort after the delivery of the cargo, which is denied, it was a non-martime tort not subject to the admiralty jurisdiction of the District Court. Moreover, it would have been a tort against Randall and/or his underwriters and not against plaintiff who had been paid by underwriters and had lost all interest in the claim prior to Randall's first contact with TTT (Appellant's Brief, p. 2).

There being no dispute that TTT signed the bill of lading as agent for the Master and it having been demonstrated "with perfect clarity" and not disputed in the court below (and we take it not disputed here) that "TTT neither acted, nor held itself out as a common carrier by water in connection with this shipment" (A.45), there was no issue of material fact. Accordingly, dismissal on motion was proper.

II

No misrepresentation on the part of TTT alleged in Point III of Appellant's brief, if any there were, which is denied, lulled Plaintiff into postponing suit against the shipowner beyond the statutory period or into not bringing suit in a court having jurisdiction over the shipowner *in personam* or the vessel *in rem*.

As mentioned, supra, it is submitted that none of the alleged activities of TTT complained of in Point III of Appellant's Brief could form the basis of a claim cognizable in admiralty and within the maritime jurisdiction of the District Court. Moreover, no such claim is included in the Amended Complaint. However, as the District Judge discussed the matter in Footnote 6 of his Memorandum Order (A.48), we shall deal with it briefly here.

As held by the District Judge, "Plaintiff's claim against Ahrenkiel *in personam* and the CONSTANTIA *in rem* became time-barred on or about July 16, 1974" (A.43). This was "one year after delivery of the goods on July 16, 1973" (A.41).*

However, it appears from the Record that Mr. Pitts of TTT did not sign the first extension of the time to sue "in the matter" until July 18, 1974 and that copy of Randall's letter requesting the extension which Mr. Pitts signed was not received by Randall until July 22, 1974. The July 18, 1974 date appears under Mr. Pitts' signature on Exhibit "B" to Randall's affidavit as reproduced in the Joint Appendix (A.21). Randall's Received Stamp in the lower lefthand corner of the Exhibit did not reproduce with clarity. However, the Exhibit in the Record clearly shows: "Received Jul 22 1974 R. F. Randall, Ltd. New York".

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* See also captions to Randall's letters requesting extensions of time (A.21, A.23).

Thus, the statements in Appellant's Brief that:

> "TTT * * * lulled plaintiff into a false sense of security * * *" (App.Brief, p.6),
>
> "It lulled plaintiff into postponing suit beyond the statutory period" (App.Brief, p.7),
>
> and
>
> "The fact is that if TTT had remained silent, suit would have been commenced timely" (App.Brief, p.9),

are not supported by the Record. The fact that the first extension of time was not given until after one year from July 16, 1973 apparently escaped the notice of the District Judge.

The contention that in signing the extension TTT was acting as agent for an undisclosed principal (App.Brief, p.6) is nonsense. Even Appellant recognizes it to be such, for at page 7 of Appellant's Brief it is asserted:

> "On two separate occasions occurring more than three months apart, TTT, by a simple signature, consented to extensions of time phrased: 'We would ask *You* to confirm extension of time in which suit may be brought * * *" (emphasis added) (A 21, 23). TTT did not sign as agent, let alone as agent for a specified principal."

We quite agree that TTT did not sign the extensions as agent for anyone; it signed for itself. After all, the claim was asserted against it (A.21). When this suit was brought against it within the time allowed by the extensions, it did not attempt to "walk away from this suit by asserting * * * that this action is time barred" (App. Brief, p. 9). TTT has never claimed that the action was time barred as against it. See TTT's Notice of Motion (A.2).

The argument at page 7 of Appellant's Brief seems to be:

TTT signed for itself but plaintiff assumed that it was signing for Ahrenkiel, a disclosed principal. Ergo, TTT was signing for an undisclosed principal.

The logic of this argument escapes us.

Apparently, the preoccupation of the representative of appellant's underwriters with the question of time to sue has caused to be overlooked completely the elementary principle that a suit against the German shipowner, to be at all effective, would have to be brought in a court which could obtain jurisdiction over him. No jurisdiction was ever obtained over Ahrenkiel in this suit and, consequently, the suit was dismissed against him for lack of personal jurisdiction (A.41-42). This ground of dismissal is quite independent of a defense of time bar. TTT was never asked to, and never purported to, subject Ahrenkiel to suit in New York. Randall's letter of June 11, 1974 requesting the first extension of time (A.21) concludes:

> "It is understood that your agreement to extend the time in which to sue places us in no better position than we would be had we commenced suit today."

There is no showing that Ahrenkiel or the vessel was subject to New York jurisdiction at any time. There is no indication or assertion that Randall ever intended to have suit brought in Hamburg or any other place where Ahrenkiel could have been found. Certainly, TTT did nothing to cause Appellant to bring suit in the Southern District of New York where jurisdiction over the shipowner was apparently unobtainable.

It is submitted that the District Court having no jurisdiction over Ahrenkiel is in no position to conduct "full trial on the facts" to determine whether Ahrenkiel is estopped from asserting the defense of time bar as Appel-

lant seeks (App. Brief, p.13). As the District Court had no jurisdiction to enter a judgment against Ahrenkiel, it makes little difference whether or not suit against him was also time barred.

CONCLUSION

The order dismissing the Complaint in its entirety should be affirmed with costs.

Respectfully submitted,

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant-Appellee TTT Ship Agencies, Inc., sued herein as Texas Transport & Terminal Co., Inc.
(212) 732-4646

JULIAN S. GRAVELY, JR.
Of Counsel

EXHIBIT

Amended Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 254

75 Civ/JMC

V/O EXPORTKHLEB and CONTINENTAL GRAIN EXPORT CORPORATION,

Plaintiffs,

—against—

AMTORG TRADING CORPORATION and TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKEL,

Defendants.

The plaintiffs herein, by their attorneys, Hill, Rivkins, Carey, Loesberg & O'Brien, complaining of the above named vessel and defendants, allege upon information and belief:

FIRST: This is an admiralty or maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure.

SECOND: At and during all the times hereinafter mentioned, plaintiffs had and now have the legal status and principal offices and places of business stated in Schedule A hereto annexed and by this reference made a part hereof.

THIRD: At and during all the times hereinafter mentioned, defendants had and now have the legal status and offices and places of business stated in Schedule A, and

were and now are engaged in business as common carriers of merchandise by water for hire, and owned, operated, managed, chartered and controlled the above named vessel which now is or will be within the jurisdiction of this Court during the pendency of this action.

FOURTH: On or about the date and at the port of shipment stated in Schedule A, there was delivered to the vessel and defendants in good order and condition the shipment described in Schedule A, which the said vessel and defendants received, accepted and agreed to transport for certain consideration to the port of destination stated in Schedule A.

FIFTH: Thereafter, the said vessel arrived at the port of destination described in Schedule A, where the cargo was delivered short and/or otherwise damaged.

SIXTH: By reason of the premises, the above named vessel and defendants breached, failed and violated their duties and obligations as common carriers and were otherwise at fault.

SEVENTH: Plaintiffs were the shippers, consignees or owners of the shipment as described in Schedule A, and bring this action on their own behalf and, as agents and trustees, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

EIGHTH: Plaintiffs have duly performed all duties and obligations on their part to be performed.

NINTH: By reason of the premises, plaintiffs have sustained damages as nearly as same can now be estimated, no part of which has been paid, although duly demanded, in the amount of $56,700.58.

WHEREFORE, plaintiffs pray:

1. That process in due form of law according to the practice of this Court may issue against defendants.

2. That if defendants cannot be found within this District, that all of their property within this District, as shall be described in the affidavit attached hereto, be attached in the sum set forth in this complaint, with interest and costs.

3. That a decree may be entered in favor of plaintiffs against defendants for the amount of plaintiffs' damages, together with interest and costs.

4. That process in due form of law according to the practice of this Court may issue against the aforesaid named vessel.

5. Plaintiffs further pray for such other, further and different relief as to this Court may seem just and proper in the premises.

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN

By: .....
Member of the firm
Attorneys for Plaintiffs

[Verification omitted]

SCHEDULE A ANNEXED TO AMENDED COMPLAINT

Plaintiff's legal status and place of business:

V/O EXPORTKHLEB is an entity organized and existing under the laws of the U.S.S.R. with an office and place of business at Smolenskaja—Bennaja 32/34, Moscow C-200, U.S.S.R.

CONTINENTAL GRAIN EXPORT CORPORATION is a corporation organized and existing under the laws of one of the 50 states of the United States with an office and place of business at two Broadway, New York, New York.

Defendants legal status and place of business:

AMTORG TRADING CORPORATION is a corporation organized and existing under the laws of the U.S.S.R., with an office and place of business at 355 Lexington Avenue, New York, New York 10017.

TEXAS TRANSPORT & TERMINAL CO., INC. is a corporation organized and existing under the laws of one of the 50 states of the United States with an office and place of business at 21 West Street, New York, New York 10006.

CHRISTIAN F. AHRENKEL is the owner of the M/V CONSTANTIA with an office and place of business at Mattentwiete 8, Hamburg, Germany.

Date of Shipment:	June 13 and June 15, 1973.
Port of Shipment:	Philadelphia, Pennsylvania.
Port of Discharge:	Nakhodka, U.S.S.R.
Shipper:	Continental Grain Export Corporation.
Consignee:	V/O ExportKhleb.
Notify:	(Shipper).
Description of Shipment:	32,353,730 pounds No. 3 yellow corn.
Nature of Loss or Damage:	Sea water damage, contamination, shortage.

Received 2 copies of the
written brief this 8th day of
February 1977

COPY RECEIVED

FEB 8 1977

HILL, RIVKINS, CAREY, LOESER & O'NEIL

CICHANOWICZ & CALLAN

FEB 8 1977

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